



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 20, 1995

Ms. Bettye S. Springer
Haynes & Boone, L.L.P.
1300 Burnett Plaza
Fort Worth, Texas 76102-6866

OR95-1507

Dear Ms. Springer

On behalf of the City of Waxahachie (the "city"), whom you represent, you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 35362.

The city received a request for "all complete City of Waxahachie Police Department Internal Affairs Division investigation packets on" twelve named individuals. You have submitted for our review records of several investigations labeled as Exhibits 4, 6, 8, 10, 12, and 13 regarding three of the named individuals. To the extent other information exists that is responsive to this request, we assume that you intend to release or already have released information concerning the other nine named persons. You claim that sections 552.102, 552.103, and 552.108 of the Government Code except the information submitted for our review from required public disclosure. We address your arguments in turn.

Although this office generally does not raise specific exceptions to disclosure when a governmental body fails to do so, we will raise section 552.101 because it is a criminal offense to disclose information that is confidential by law. *See* Gov't Code § 552.352. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The City of Waxahachie is governed by chapter 143 of the Local Government Code. Section 143.089(g) of the Local Government Code provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

In *City of San Antonio v. Texas Attorney General* 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by a city police department for its use. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *City of San Antonio*, 851 S.W.2d at 949.¹

We have examined the information submitted to us for review. We note that the investigatory records in Exhibits 10, 12, and 13 all relate to complaints that were either withdrawn or determined to be unfounded. We assume, therefore, that these investigations did not result in disciplinary action against a police officer. If this is the case, the city must withhold Exhibits 10, 12, and 13 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. On the other hand, if the internal affairs investigation did result in disciplinary action, then "any letter, memorandum, or document relating to" the disciplinary action must be transferred to the civil service commission as required by section 143.089(a)(2) of the Local Government Code and must be released by the civil service commission under section 143.089(f) of the Local Government Code unless some provision of the Open Records Act or other law permits the commission to withhold the documents. Open Records Decision No. 562 (1990); *see also* Local Gov't Code § 143.089(f). The city is required to refer any person who requests information maintained in an officer's personnel file to the civil service commission.

You claim that section 552.103(a) excepts from disclosure the documents labeled as Exhibits 4 and 6 because the requestor's client has filed an EEOC complaint against the city's police department and because she has threatened litigation on numerous occasions. To secure the protection of section 552.103(a), a governmental body must

¹The *City of San Antonio* court, however, did not comment on the availability of information contained in the police officer's civil service file. In cases in which a police department takes disciplinary action against a police officer, section 143.089(a)(2) requires that the department transfer "any letter, memorandum, or document relating to" the disciplinary action to the city civil service commission. The city civil service commission may not withhold these records under section 552.101 of the Government Code in conjunction with section 143.089 of the Local Government Code. Open Records Decision No. 562 (1990); Local Gov't Code § 143.089(f).

demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated and that the requested information relates to that judicial or quasi-judicial proceeding. Open Records Decision No. 555 (1990) at 2. You have provided this office a copy of the most recent EEOC complaint filed by the requestor's client. This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 (1983) at 2, 336 (1982) at 1. A review of the EEOC complaint and the documents labeled as exhibits 4 and 6 indicate that the documents relate to reasonably anticipated litigation.

We note, however, that the opposing party to the anticipated litigation has seen or had access to several of the documents in exhibit 4. Absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Finally, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). You may therefore withhold exhibits 4 and 6 under section 552.103 only if the opposing party to the anticipated litigation has not previously seen or had access to any of the records.

Finally, we address your contention that section 552.108 of the Government Code excepts Exhibit 8 from required public disclosure. Section 552.108 excepts from disclosure "[a] record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime." When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within section 552.108 must be determined on a case-by-case basis. *Id.* at 2.

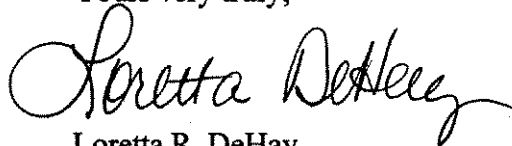
You claim that the records labeled as exhibit 8 are related to an active criminal investigation. You state that "the City is currently considering filing an additional criminal charge against [the former police officer] for tampering with government property." In addition, "the City expects to develop evidence during the Civil Service appeal hearing which would establish [the former police officer's] culpability for tampering with [government property]." We conclude that you have established that the records labeled as exhibit 8 relate to an active criminal investigation. Accordingly,

except for information that is generally found on the first page of an offense report which must be released, the city may withhold exhibit 8 under section 552.108 of the Government Code.

In conclusion, you must withhold exhibits 10, 12, and 13 under section 143.089(g) of the Local Government Code if the investigations did not result in disciplinary action against the police officers. You may withhold exhibits 4 and 6 under section 552.103 to the extent that the opposing party to the anticipated litigation has not seen or had access to the records. Finally, you may withhold exhibit 8 under section 552.108; however you must release information normally found on the first page of an offense report.²

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: ID# 35362

Enclosures: Submitted documents

cc: Ms. Jane E. Bishkin
Staff Attorney
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(w/o enclosures)

² We note that records which were the subject of Open Records Letter No. 95-1505 (1995) may not be withheld under sections 552.103 or 552.108 to the extent that such records overlap with the records that are subject to this request. See Gov't Code § 552.007. In addition, because we conclude that you must withhold exhibits 10, 12, and 13 under section 143.089 of the Local Government Code, we do not address your arguments under section 552.102 of the Government Code.